Supreme Court, U.S.
FILED
OCT 23 2002
CLERK

No. 02-272

In the
Supreme Court of the United States

LOIS STRAWSER, *et al.*,
Petitioners,

v.

NANCY V. ATKINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

ROY COOPER
North Carolina Attorney General

*James C. Gulick, Senior Deputy Attorney General
Karen E. Long, Special Deputy Attorney General
Daniel F. McLawhorn, Special Deputy Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
Telephone: (919) 716-6900
Facsimile: (919) 716-6763
Counsel for Respondents Easley, Moore, Buell and Yeager

[Additional Counsel Listed On Inside Front Cover]

October 23, 2002

**Counsel of Record*

16 pp

Charlie Condon
Attorney General
Treva G. Ashworth
Deputy Attorney General
J. Emory Smith, Jr.
Assistant Deputy Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3680

Counsel for Respondents Condon and Prince

Frances A. Hughes, Esq.
Managing Deputy Attorney General
State of West Virginia
State Capitol
Building 1, Room E-26
1900 Kanawha Blvd., East
Charleston, WV 25305
Telephone: (304) 558-2021

Counsel for Respondent Attorney General Darrell V. McGraw, Jr.

Richard G. Hepfer
Deputy General Counsel
Department of Health and Human Services
P.O. Box 8206
Columbia, SC 29202-8206
Telephone: (803) 898-2795

Counsel for Respondent Prince

Cory Hohnbaum, Esq.
Marie Ellen Gibbs, Esq.
Kennedy, Covington, Lobdell & Hickman, LLP
100 N. Tryon St., Suite 4200
Charlotte, NC 28202
Telephone: (704) 331-7400

Counsel for Respondent CitiBank, N.A.

Matthew W. Sawchak, Esq.
Ellis & Winters, LLP
Post Office Box 33550
Raleigh, NC 27636
Telephone: (919) 865-7000

Counsel for Respondent Golden L.E.A.F.

Randall L. Trautwein, Esq.
Lamp, O'Dell, Bartram, Levy & Trautwein, PLLC
Post Office Box 2488
Huntington, WV 25725
Telephone: (304) 523-5400

Counsel for Respondent CitiBank, N.A.

QUESTION PRESENTED

Does Section 1396b(d)(3)(B)(ii) of Chapter 42 of the United States Code, which provides that "a State may use amounts recovered or paid to the State as part of" the national tobacco settlement "for any expenditures determined appropriate by the State," mean that the States may use these funds for any purposes that they deem appropriate, even when Medicaid recipients claim that they are entitled to some of those funds on authority of Section 1396k(b) of Chapter 42 of the United States Code?

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STATEMENT OF RELATED CASES

Three times this year this Court has denied petitions for certiorari involving the same issue of statutory construction that Petitioners seek to raise. *See Greenless v. Almond*, 70 U.S.L.W. 3709 (U.S. Oct. 7, 2002) (No. 01-1635), *denying cert. to* 277 F.3d 601 (1st Cir. 2002); *Tyler v. Douglas*, 122 S. Ct. 2361 (2002), *denying cert. to* 280 F.3d 116 (2d Cir. 2001); *Harris v. Owens*, 122 S. Ct. 2294 (2002), *denying cert. to* 264 F.3d 1282 (10th Cir. 2001).[1] This Petition mischaracterizes *Harris* and *Tyler* as pending petitions. *See* Pet. at 2, 16.[2] The Court denied certiorari in *Tyler* two months before this petition was filed, in *Harris* seven weeks before this petition was filed, and in *Greenless* earlier this month.

STATEMENT OF THE CASE

Respondents adopt the Fourth Circuit's statement of facts and statement of the district court proceedings, *see* Pet. at 5a-12a, and supplement it briefly as follows. This conflict arises out of the States' settlement of their lawsuits against leading tobacco manufacturers. North Carolina, West Virginia and South Carolina, like most other States, sued tobacco manufacturers on a number of claims, including restraint of trade and unfair and deceptive trade practices. They sought injunctive relief as well as past and future damages for the States arising out of the companies' manufacturing and marketing of tobacco products. No individual plaintiffs were

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[1] Petitioners themselves admit that *Greenless* and *Harris* "present[ed] essentially the same issues of statutory construction" that this case presents. Pet. at 2.

[2] The text of the petition states that *Harris* and *Tyler* are pending, Pet. at 2, 16. However, the Table of Cases correctly indicates that *Tyler* was denied by this Court on June 10, 2002.

party to the suit, and the States alleged harm only to themselves and the general public as a whole.

The Master Settlement Agreement (MSA)[3], which settled the lawsuits filed by these three and forty-three other states, released only the states' claims against the tobacco manufacturers. The MSA expressly did not settle or release the claims of all other persons for "private or individual relief for separate and distinct injuries." MSA § II(pp), p. 19. In addition, the tobacco product manufacturers who signed the MSA expressly did not admit liability or wrong doing. MSA § XVIII(e), p. 113.

Subsequent to the signing of the MSA but prior to the filing of the suits herein, Congress enacted 42 U.S.C. § 1396b(d)(3)(B), which provided that the States' recovery under the MSA was not subject to the Federal Medicaid recoupment provisions. That statute provides as follows:

> (i) Subparagraph (A) and paragraph (2)(B) [which refer to the Medicaid recovery provisions upon which the Petitioners here base their claim for MSA money] shall not apply to any amount recovered or paid to a State as part of the comprehensive settlement of November 1998 between manufacturers of tobacco products, as defined in section 5702(d) of Title 26, and State Attorneys General, or as a party of any individual state settlement of judgment reached in litigation initiated or pursued by a State against one or more such manufacturers

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[3] Full text of the Master Settlement Agreement with Exhibits can be found at: http://www.naag.org/upload/1032468605_cigmsa.pdf. All MSA page references *infra* refer to the electronic pagination which differs from the pagination indicated in the document's Table of Contents.

> (ii) Except as provided in subsection (i)(19), a State may use amounts recovered or paid to the State as part of a comprehensive or individual settlement, or a judgment, described in clause (i) for any expenditures determined appropriate by the State.

Despite this statute, Petitioners brought suit in the federal courts of their respective States contending that a share of the MSA payments belonged to them under the Medicaid recovery provisions of the Medicaid Act, 42 U.S.C. § 1396k(b).[4] District courts in all three States dismissed the complaints.

The Fourth Circuit affirmed the district courts' decisions, relying on the plain meaning of 42 U.S.C. § 1396b(d)(3)(B)(ii). *See* Pet. at 16a-18a. In so holding, the Fourth Circuit expressly followed the First, Second, and Tenth Circuits' recent decisions on the same issue -- decisions that have recently been denied review in this Court. *See id.* at 17a-18a; *Greenless,* 70 U.S.L.W. 3709; *Tyler,* 122 S. Ct. 2361; *Harris,* 122 S. Ct. 2294.

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[4] Similar suits were filed by Medicaid recipients in many states. Generally, as in *Greenless, Tyler* and the cases presented by this petition, the plaintiffs had some common counsel.

ARGUMENT

I. THIS CASE PRESENTS A NARROW ISSUE OF STATUTORY CONSTRUCTION THAT THE COURTS OF APPEALS HAVE CONSISTENTLY DECIDED IN FAVOR OF THE STATES.

Petitioners ask the Court to review the Fourth Circuit's interpretation of 42 U.S.C. § 1396b(d)(3)(B)(ii), arguing that the Fourth Circuit incorrectly applied the plain meaning doctrine of statutory construction. Petitioners' request should be denied.

First, the statute has been consistently interpreted by the Courts of Appeals to deny Medicaid recipients' claim to MSA money – there is no conflict among them. The First, Second, and Tenth Circuits have interpreted 42 U.S.C. § 1396b(d)(3)(B)(ii) the same way that the Fourth Circuit interpreted it here. *See Greenless,* 277 F.3d at 608-09; *Tyler,* 280 F.3d at 121-24; *Harris,* 264 F.3d at 1294-98; Pet. at 17a-18a.[5] Because the holdings in *Greenless, Harris, Tyler,* and this case are so similar, Petitioners do not even claim a circuit conflict on the question presented. Instead, they attack "the opinions of the First, Second, Fourth, and Tenth Circuits" as an integrated group. Pet. at 7. This argument confirms the lack of a conflict among the circuits that would invite review by this Court. In particular, there is no conflict "on the same . . . matter" addressed in this petition -- the interpretation of Section

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[5] The Sixth Circuit has recently joined this group by interpreting Section 1396b(d)(3)(B)(ii) the same way. *Barton v. Summers*, 293 F.3d 944 (6th Cir. 2001), *rehearing, en banc, denied,* No. 00-5942/00-6282, 2002 U.S. App. LEXIS 16357 (6th Cir. Aug. 9, 2002).

1396b(d)(3)(B)(ii). SUP. CT. R. 10(a) (2002). No court of appeals has accepted Petitioners' interpretation of that statute.[6]

Consequently, Petitioners seek to manufacture a conflict from the fact that some courts have relied on reasons for denying the Medicaid recipients' claims different from those reached by the Fourth Circuit here. *See* Pet. at 12-16.[7] This does not create a conflict among the Circuits. It merely reflects the fact that there are many reasons why the Petitioners' claims fail.[8] Since the Fourth Circuit avoided

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[6] Petitioners cite a Seventh Circuit decision in which the existence and significance of Section 1396b(d)(3)(B) was raised for the first time at oral argument. *See Floyd v. Thompson,* 227 F.3d 1029, 1034 (7th Cir. 2000); Pet. at 13. The Seventh Circuit spent two sentences, less than one hundred words, wondering about Congress's *motives* for passing Section 1396b(d)(3)(B), before moving on to other issues, including the basis it found for affirming dismissal of the Medicaid recipients' claims. *Floyd* creates no conflict among the circuits as to the meaning of Section 1396b(d)(3)(B)(ii).

[7] Petitioners indicate that seven Courts of Appeals in addition to the Fourth have decided claims on tobacco settlements by Medicaid recipients. All of the decisions have been adverse to the Medicaid recipients. Pet. at 13-16. In addition to the cases already cited herein, these decisions include *McClendon v. Georgia Dep't of Community Health,* 261 F.3d 1252 (11th Cir. 2001); *Clark v. Stovall,* No. 01-3097, 2002 U.S. App. LEXIS 8312, (10th Cir. April 30, 2002), *cert. denied,* 71 U.S.L.W. 3264, 2002 U.S. LEXIS 7604 (U.S. Oct. 15, 2002); and *Watson v. Texas,* 261 F.3d 436 (5th Cir. 2001).

[8] Respondents herein raised numerous other defenses themselves, including Eleventh Amendment Immunity and several more that the Fourth Circuit catalogued in its opinion below but found it unnecessary to decide. *See* Pet. at 23a, fn.9. The Fourth Circuit recognized that each State had invoked its Eleventh Amendment Immunity. *See* Pet. at 12a-13a. The Court held that it could "properly base [its] holding on the plain language of [Section 1396b(d)(3)(B)(ii)] without resolving the Eleventh-Amendment question," relying on *Vermont Agency of Natural Resources v. United States,* 529 U.S. 765, 779 (2000). Pet. at 13a. (cont'd . . .)

deciding the Eleventh Amendment issue, it is self-evident that the Sixth and Tenth Circuits' disagreement over its application in *Harris* and *Barton* is irrelevant to this case. Moreover, it is immaterial; *Barton*'s ruling on the plain meaning of Section 1396b(d)(3)(B)(ii) is identical to the rulings by the Tenth and Fourth Circuits.[9]

Second, petitions to review the decisions in *Greenless, Harris,* and *Tyler* have already been denied by this Court. This petition presents nothing new.

Finally, the petition presents only a narrow issue, the resolution of which would not create meaningful precedent. This case involves no more than the *application* of the plain-meaning doctrine to one specialized statute. Petitioners complain that "the Fourth Circuit found [Section 1396b(d)(3)(B)(ii)] to be clear, though it is not." Pet. at 11. Even if Petitioners were right, the statute at issue applies only to the States' tobacco settlements, a one-time event. A decision on this narrow statute would not help the lower courts in any other context.

(. . . cont'd)
Respondents continue to reserve all of these defenses.

[9] The Fifth Circuit's ruling on Eleventh Amendment Immunity in *Watson v. Texas* is irrelevant to this case for a different reason. *Cf.* Pet. at 2. As Petitioners eventually admit, *Watson* turned on Texas's express waiver of Eleventh Amendment Immunity. *See Watson,* 261 F.3d at 441. In addition, contrary to this petition, *Watson* did not involve the multi-state Master Settlement Agreement at issue here. That case involved Texas's separate settlement with the tobacco companies. *See id.* at 439, 441.

II. THE PETITION CONTAINS SEVERAL MISSTATEMENTS OF FACT OR LAW.

In addition to mischaracterizing the status of the *Harris* and *Tyler* petitions, *see* p. 4, *supra*, the petition makes certain other misstatements that must be noted now. *See generally* SUP. CT. R. 15.2 (2002).

First, 42 U.S.C. § 1396k(b) does not apply to "any Medicaid recovery." Pet. at 2. It applies only to amounts "collected by [a] State *under an assignment* made under the provisions of [that] section." 42 U.S.C. § 1396k(b) (2002) (emphasis added). The States have all disputed that they based their claims on any assignment by Medicaid recipients.

Second, the record contains no "evidence," as Petitioners assert, that "confirms that the settlement collections of West Virginia, South Carolina, and North Carolina will substantially exceed their actual smoking-related Medicaid expenditures." Pet. at 4-5. It contains only Petitioners' allegation that this is the case. In any event, this is immaterial to the issue at hand. As the Fourth Circuit opinion notes, the MSA settled numerous state claims. Pet. at 9a. The MSA release recites that the settlement is of all state claims "directly or indirectly based on, arising out of or in any way related in whole or in part, to (A) the use, sale, distribution, manufacture, development, advertising, marketing, or health effects of, (B) the exposure to, or (C) research, statements or warnings regarding, Tobacco Products." *Id.* The MSA expressly did not resolve or settle any individual persons' claims against the tobacco manufacturers. Petitioners, like all other persons, continue to have the right to sue the tobacco manufacturers as individuals under the express terms of the MSA. The States continue to pay the current and future medical costs of Medicaid recipients.

Third, the record does not support Petitioners' assertion that, "before these Medicaid enforcement lawsuits, there was no material controversy over the . . . proposition that the tobacco settlement constituted a Medicaid recovery." Pet. at 5. On the contrary, the Congressional Record concerning Section 1396b(d)(3)(B) reflects that there was a controversy and that Congress proposed to end it in the states' favor. "In the Conference Report, the committee recognized that uncertainty over the distribution of the funds would create 'litigation over the next several years, delaying the availability of these funds and putting planned State uses on hold' and therefore adopted the provision 'in order to permit States which are delaying their plans for the use of these funds the certainty they need to plan their initiatives.' H.R. Conf. Rep. No. 106-143, at 99 (1999)." *Harris*, 264 F.3d at 1295.

CONCLUSION

Respondents respectfully request that the Court deny the petition for certiorari.

Respectfully submitted, this the 23rd day of October, 2002.

ROY COOPER
ATTORNEY GENERAL

*James C. Gulick
Senior Deputy Attorney General
Karen E. Long
Special Deputy Attorney General
Daniel F. McLawhorn
Special Deputy Attorney General

North Carolina Dept. of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
Telephone: (919) 716-6900

Counsel for Respondents Easley, Moore, Buell and Yeager

Charlie Condon
Attorney General
Treva G. Ashworth
Deputy Attorney General
J. Emory Smith, Jr.
Assistant Deputy Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3680

Counsel for Respondents Condon and Prince

Richard G. Hepfer
Deputy General Counsel
Department of Health and Human Services
P.O. Box 8206
Columbia, South Carolina 29202-8206
Telephone: (803) 898-2795

Counsel for Respondent Prince

Frances A. Hughes, Esq.
Managing Deputy Attorney General
State of West Virginia
State Capitol - Building. 1, Room E-26
1900 Kanawha Boulevard, East

Charleston, West Virginia 25305
Telephone: (304) 558-2021

Counsel for Respondent Attorney General
Darrell V. McGraw, Jr.

Cory Hohnbaum, Esq.
Marie Ellen Gibbs, Esq.
Kennedy, Covington, Lobdell &
Hickman, LLP
100 N. Tryon Street, Suite 4200
Charlotte, North Carolina 28202
Telephone: (704) 331-7400

Counsel for Respondent CitiBank, N.A.

Randall L. Trautwein, Esq.
Lamp, O'Dell, Bartram, Levy & Trautwein,
PLLC
Post Office Box 2488
Huntington, West Virginia 25725
Telephone: (304) 523-5400

Counsel for Respondent CitiBank, N.A.

Matthew W. Sawchak, Esq.
Ellis & Winters, LLP
Post Office Box 33550
Raleigh, North Carolina 27636
Telephone: (919) 865-7000

Counsel for Respondent Golden L.E.A.F.

October 23, 2002 **Counsel of Record*